United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1911

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROYAL STEUBING, 231 East Virginia Blvd., Jamestown, New York, CHAUTAUQUA COUNTY ENVIRONMENTAL DEFENSE COUNCIL, JOSEPH CATANIA, Drive-In Motel, Westfield, New York, ROBERT SEINDELL, 19 Chestnut Street, Jamestown, New York, JAMESTOWN AUDUBON SOCIETY, MARTIN OQUIST, Greenhurst, New York, JACK LLOYD, Greenhurst, New York, RICHARD MUDGE, 49 Peleison Street, Jamestown, New York, TROUT UNLIMITED, ALAN REPPENHAGEN, Silver Creek, New York, CHAUTAUQUA COUNTY FEDERATION OF SPORTSMEN, CHARLES MOHNEY, Bemus Point, New York, CHAUTAUQUA LAKE POWER BOAT CLUB,

Plaintiffs-Appellees,

v.

CLAUDE S. BRINEGAR, Secretary of Department of Transportation, 400 7th Street, S. W., Washington, D. C. 20590, RAYMOND T. SCHULER, Commissioner of New York State Department of Transportation, Albany, New York,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS-APPELLEES

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Issue Presented

The District Court did not abuse its discretion by refusing to apply the doctrine of laches and granting a preliminary injunction.

ARGUMENT

POINT I

The District Court did not err by refusing to apply the doctrine of laches.

Traditionally, laches is an equitable doctrine instituted when courts have found that plaintiffs have unconscionably delayed bringing a lawsuit until such time as defendants have been prejudiced through the delay. *Gustello v. United States*, 365 U.S. 265 (1961). However, in environmental litigation in general, and particularly where compliance with the National Environmental Policy Act (hereinafter cited as NEPA) is an issue in the case, courts have applied different standards in dealing with the application of laches.

Most courts which have dealt with the issue of laches have found that the public policy favoring environmental protection set forth in NEPA has outweighed other considerations. See, *e.g.*, *Jones v. Lynn*, 477 F. 2d 885 (1st Cir. 1973); *Arlington Coalition v. Volpe*, 458 F. 2d 1323 (4th Cir. 1972); *Brooks v. Volpe*, 460 F. 2d 1193 (9th Cir. 1972); *Environmental Defense Fund v. T. V. A.*, 468 F. 2d 1164 (6th Cir. 1972); *Calvert Cliffs v. AEC*, 449 F. 2d 1109 (D. C. C. 1971); *Pennsylvania Environmental Council v. Bartlett*, 315 F. Supp. 238 aff. 454 F. 2d 613 (M. O. Pa. 1970); *I-291 Why? Association v. Burns*, 372 F. Supp. 223 (D. Conn. 1974); *James River and Kanawha Canal Parks v. R. M. A.*, ____ F. Supp. ____, 5 ERC 1353 (E. D. Va. May 7, 1973).

The Courts reason that the institution of the lawsuit itself helps to effectuate national policy and the interests being vindicated are those of the public at large. As the Court stated in *Environmental Defense Fund v. T. V. A.*,

Supra at 1182. "[T]he strong public policy embodied in the NEPA concerning the importance of agency consideration of environmental values mitigates against barring that suit on the ground of unreasonable delay . . ."

Furthermore, the Courts have found the competing public interest in requiring public officials to obey statutory mandates to outweigh any tardiness in bringing the action. In the landmark decision of *Calvert Cliffs v. AEC, Supra,* one of the earliest cases dealing with NEPA, the Court at footnote 21 of its decision stated:

> In recent years, the Courts have become increasingly strict in requiring that Federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated.

This Court has made the same point regarding the Federal Power Commission, holding that "the right of the public must receive active and affirmative protection at the hands of the Commission." *Scenic Hudson Preservation Conference v. F. P. C.*, 354 F. 2d 608, 620 (2nd Cir. 1965).

In the instant case, the District Court found that the plaintiffs neither unconsionably delayed in bringing suit nor were the defendants prejudiced thereby in order to sustain a laches defense. This finding was made only after a full hearing before the United States Magistrate sitting as a Special Master, and after a full review of the testimony and argument before the District Court. Moreover, Judge Curtin was exceedingly sensitive to not issuing an injunction before all the facts were before him, and in fact offered both the plaintiffs and defendants another opportunity to present further evidence prior to his decision (137a). Only

after this painstaking review, and when no further evidence was presented, was an injunction ordered.

As pointed out in the Report and Recommendation of Magistrate Maxwell, the facts were essentially undisputed, and the decision was based upon certain "critical" factors.

In deciding whether or not the plaintiffs delayed in bringing suit for laches purposes, the Court found May 9, 1973, the date of the Federal government's Plans, Specifications and Estimates approval (hereinafter cited P. S. & E. approval) as the "critical" date to start the time running to see if plaintiffs unconscionably delayed in bringing suit. Both the Federal and State Appellants argue that this P. S. & E. date was improper. However, it is respectfully urged that the May 9, 1973 date is proper both in terms of past precedent and in terms of the evidence before the District Court.

As noted in the District Court's decision (143a), both this Court and other courts have clearly held that "[T]he Federal government is not obligated to fund a particular project until the Secretary of Transportation has given P. S. & E. approval [citing 23 U.S.C. § 106 (a)]." *Monroe County Conservation Council Inc. v. Volpe*, 472 F. 2d 693, 699 (2nd Cir. 1972).

The reasoning behind choosing this date is clear. Since until this date the Federal government could decide not to approve and fund the project, it would be unfair to require prospective plaintiffs to bring a lawsuit which may be unnecessary. Moreover, up to the P. S. & E. approval date, both the design and actual construction of a project may be altered or abandoned, which would again obviate the necessity of a lawsuit. And lastly, up until this critical stage, prospective plaintiffs surely have the right to rely on Federal officials fulfilling nondiscretionary obligations man-

dated by Congress and which, if not fulfilled, would be the basis of the lawsuit. See generally, *Environmental Defense Fund v. T. V. A., Supra; I-291 Why? Association v. Burns, Supra.*

If a lawsuit were to be brought for failure to prepare an Environmental Impact Statement (hereinafter cited EIS) prior to P. S. & E. approval, the suit itself might be open to dismissal as premature. As stated by District Judge Blumenfeld in *I-291 Why? Association v. Burns, Supra* at 236.

> But this Court is chary of forcing on those in plaintiff's position at the time of design approval the choice between filing a suit without good faith belief in its merits or loosing the opportunity to sue later should new facts come to light raising substantial questions as to the adequacy of the EIS upon which design approval was originally granted. The better position, as suggested in *Clark v. Volpe, Supra,* is to allow one opposed to a proposed federally-funded highway to presume, in the absence of evidence to the contrary, that public officials will properly fulfill their statutory obligations until such time as P. S. & E. approval makes the commencement of actual construction imminent. Once P. S. & E. approval issues, a potential plaintiff must decide if there is sufficient reason to warrant suspicion of non-compliance. If such suspicion is justified, the plaintiff must then act diligently to develop its case and, if this results in a good faith belief in non-compliance with pertinent statutes, file its complaint.

As pointed out in Magistrate Maxwell's Report and Recommendation (80 (a), 83 (a)), that the May, 1973, P. S. & E. approval date was in fact the critical date is clearly reflected in the uncontested testimony of Mr. Donald Bestgen, the defendant's own witness, and the only witness presented who was responsible for interpreting the Federal government's role in the Bridge. When asked whether or not the

Federal Government was committed to funding the Bridge prior to P. S. & E. approval, Mr. Bestgen testified, "we're not committed with funds until P. S. & E. approval time." (t. 277).

Appellant Brinegar frankly concedes in his brief herein that if the May, 1973, P. S. & E. approval date is in fact the correct date, laches would not apply. It is respectfully submitted that, based upon the entire record before the District Court, Magistrate Maxwell was correct in factually finding that the May, 1973, P. S. & E. approval date was critical, and Judge Curtin did not abuse his discretion in affirming that finding.

Irrespective of any alleged delay on the part of the plaintiffs in filing suit, the facts elicited in the District Court concerning prejudice to the defendants clearly supports the Court's finding that any such prejudice would not sustain a laches defense. This is particularly true when comparing the facts in the instant case to facts in the vast majority of cases where an injunction was issued.

As noted in Magistrate Maxwell's Report and Recommendation, as of December 14, 1973, some three weeks after the lawsuit was filed, the construction on the bridge substructure was only 3% complete (87 (a)), and only one-million of an approximate thirty-million dollars had been spent during the period of delay (85 (a)). Most Courts which have dealt with cases at similar or more advanced stages of construction have not hesitated to issue an injunction where NEPA or other Federal environmental laws were not complied with. See *e.g., Citizens v. Volpe,* 401 U.S. 402 (1971), (all right of way acquired and $2,206,000 spent); *Brooks v. Volpe,* 460 F. 2d 1193 (8th Cir. 1972), (all right of way acquired and construction begun); *Scherr v. Volpe,* 466 F. 2d 1027 (7th Cir. 1972), (Construction contracts awarded

and actual construction begun); *Environmental Defense Fund v. T. V. A.*, 468 F. 2d 1164 (6th Cir. 1972), (laches denied and injunction entered even though two-thirds of land needed had been acquired, $29 million spent, a steel span bridge had been completed, 5-8 miles of new roads and 30 miles of relocated roads had been acquired and construction begun on all other major components of the project except a navigational canal. Moreover, the District Court had found it would cost $50 million more to halt construction); *Arlington Coalition v. Volpe*, 458 F. 2d 1323 (4th Cir. 1972), (93.9% of all dwellings acquired, 98.5% of all businesses relocated, 84.4% of all right of way acquired, and construction started at a cost of $28,670,023.07); *Calvert Cliffs v. AEC*, 449 F. 2d 1109 (D.D. Cir. 1971), (Nuclear power facilities in various phases of construction); *Conservation Society v. Texas*, 446 F. 2d 1013 (5th Cir. 1971), (two end segments of a highway leading up to a park were completed and all right of way in park completed); *D.C. Federation v. Volpe*, 459 F. 2d 1231 (D.C.Cir.1971), (halted work in progress on Three Sisters Bridge); *I-291 Why? Association v. Burns*, 372 F. Supp. 223 (D. Conn. 1974), (denied laches defense and injunction entered even though clearing, drainage work, and construction of temporary approaches completed, $10,996,216.92 contract awarded); *Ward v. Ackyard*, 344 F. Supp. 1202 (D. Md. 1972), (denied laches defense and injunction entered even though $16,400,000 spent, all right of way acquired); *Brooks v. Volpe*, 311 F. Supp. 90 (W. D. Wash. 1972) (On remand, an injunction entered after all trees cleared through a forest, grading started, seven major structures underway, $14 million of construction under contract, and substantial percentage of work completed); *Arizona Wildlife Federation v. Volpe*, ____ F. Supp. ____, 4 E.R.C. 1673 (D. Ariz. 1972), (road 53% complete); *Keith v. Volpe*, 352 F. Supp.

1324 (D. C. Calif. 1972), (55.8% of 6073 parcels acquired for cost of $88,651,000); *Environmental Defense Fund v. Corps of Engineers,* 324 F. Supp. 878 (D. D. C. 1971), (construction had been proceeding for seven years and Cross-Florida Barge Canal one-third completed); *Harrisburg Coalition v. Volpe,* 330 F. Supp. 918 (M. D. Pa. 1971), (denied defense of laches and injunction issued after construction of highway begun); *Sierra Club v. Froellke,* 359 F. Supp. 1289, 5 E. R. C. 1033 (S. D. Tex. Feb. 16, 1973), (construction 87% complete); *James River and Kanawha Canal Parks v. R. M. A.,* ____ F. Supp. ____, 5 E. R. C. 1353 (E. D. Va. May 7, 1973), (laches defense denied and injunction entered after all right of way acquired and a bond issue passed in reliance of highway); *Barta v. Brinegar,* 358 F. Supp. 1025, 5 E. R. C. 1949 (W. D. Wisc. May 11, 1973), (laches defense denied and injunction entered after 70% of one highway completed, another 51% complete and construction had just begun on another).

Appellant Schuler alleges that the District Court erred in not considering the entire Southern Tier Expressway rather than only the section in issue in determining the prejudice to defendants, and in not considering the action of private individuals in reliance on the construction of the Bridge. It is respectfully submitted that even if both of these elements were considered, there is still abundant precedent for denying a laches defense and entering an injunction. However, plaintiffs urge that the District Court's decisions on these points were in fact proper.

Concerning the District Court's decision to decide the case on the facts of the Bridge Section, Section 5 (c), this Court has clearly addressed a similar issue in *Monroe County Conservation Council Inc. v. Monroe, Supra.* In that case, the Court was dealing with the "outer loop" highway in

Rochester, New York. The highway was to be twenty-three miles long, with sixteen miles already completed. The particular section in issue in the case was 4.25 miles long. As in the instant case, the State and Federal government in *Monroe* asked that this Court consider the entire highway, arguing that NEPA did not apply to a project as advanced as the "outer loop" on the effective date of NEPA. This Court, however, refused to consider the entire highway, and stated "it is only this specific 4.25 mile segment of highway which is of concern. It is true that other portions of the contemplated "outer loop" have been completed, but that fact does not in any way obligate the Federal government to fund the section in question here. "*Id.* at 699. See also, *e.g., Green County Planning Board v. F. P. C.*, 455 F. 2d 412 (2nd Cir. 1972); *I-291 Why? Association v. Burns, Supra. Monroe* is on all fours with the case herein and, clearly, Judge Curtin did not err in citing it in support of only considering Section 5 (c) in the instant case.

While plaintiffs urge the Court that *Monroe* is dispositive of the issue, it is clear that if plaintiffs were in fact held accountable to knowledge of an entire highway, rather than the particular section at issue, the burden would be so great that it would effectivly estop any citizens from bringing lawsuits under NEPA. Highways are normally planned in sections, and often over many miles in length and over many years. The Highways are not only planned in sections, but generally many miles of a Highway will be completed before the section of highway of interest to a particular plaintiff is designed, let alone construction started on it. Can a plaintiff be held accountable for a completed section of highway hundreds of miles away, completed before the plaintiff had any knowledge that the highway he is concerned with may, for example, take a park in his community in violation of Federal Law? This would obviously be an

impossible burden, and one which public citizens could never carry. The effect of a Court so ruling would frustrate the congressional intent of Section 101 (A) of NEPA to include the public in conserving environmental values. As was stated in *I-291 Why? Association v. Burns, Supra* at 237, "dozens of cases have demonstrated that absent the advocacy of such groups, the procedural rights and protections enshrined in NEPA stand in jeopardy of being ignored with impunity."

In dealing with the second issue raised by Appellant Schuler, the failure of the District Court to consider private parties' action taken in reliance of the Bridge Construction, the same considerations apply as previously stated. Many private individuals and corporations make decisions based upon what government may or may not do. These decisions are usually made without public knowledge. Again, it would be an impossible burden for a prospective plaintiff to be held accountable to decisions of private parties, made without the plaintiff's knowledge, on prospective government action.

Moreover, the lawsuit herein is merely asking for compliance with Federal Laws. The District Court did not order that the Bridge should never be built, but that environmental considerations be weighed in the decision making process through preparation of an EIS before deciding whether or not to build a bridge. Upon completion of the EIS, the government may still decide to build a Bridge, or they may choose an alternative course of action which would fulfill the same economic goals for the private party involved.

It also should not be overlooked that the private parties in the instant case relied on an action of the Federal government prior to P. S. & E. approval, and, therefore, prior

to the time that the Federal government was actually committed to the Bridge project. Should plaintiffs herein be held accountable to a corporate decision made before the private party had a right to rely on the governmental action?

Finally, while Judge Curtin refused, as a matter of law, to give weight to the private reliance on the Bridge completion, a decision we urge upon the Court as correct, Magistrate Maxwell did in fact consider such reliance over plaintiffs' objections, and still factually found that the laches' argument could not be sustained. Clearly, if error was committed, it was harmless at best.

In dealing with an equitable argument such as laches, it is submitted that the Court should also consider where defendants stand in equity. We are no longer dealing with a new statute never before interpreted by the Courts. The duties and responsibilities of the Federal and State Defendants have been ordered clearly by this Court and other Courts. Concerning the preparation of EIS, this Court stated in *Monroe County Conservation Council v. Volpe*, *Supra* at 699,

> "This Court has been rigorous in applying NEPA to Federal Power Commission decisions, even where hearings were held prior to the effective date . . . and a project was under contract but not licensed prior to the effective date. . . .
>
> With regard to highway aid, the Federal government is not obligated to fund a particular project until the Secretary of Transportation has approved plans, specifications, and estimates for the construction, 23 U.S.C. § 106 (a) (P. S. & E. approval). This approval in the present case was not given prior to the effective date of NEPA and, therefore, an impact statement must be prepared. . . ."

As we have seen, in the instant case P. S. & E. approval was not given until May 9, 1973, over three years after the effective date of NEPA and a considerable amount of time after the above cited decision. Nevertheless, and in spite of the clear mandate of this Court, the defendants herein completely disregarded NEPA and the Court's decision. No EIS was prepared, and no expanded hearings were held. Even at this late date, to the knowledge of plaintiffs, no EIS has been started, even though ordered by the District Court herein and even though defendants have not requested a stay of that order.

An intimation of defendant's attitude can be gleaned from a letter written on April 16, 1973, by John G. Bestgen, the Federal Highway Administration's Division engineer for the project, to the New York State Department of Transportation, where he states:

> "As you are aware, the procedures of P. P. M. 90-1 have been recently challenged, and there is a very good possibility the Environmental Impact Statements may be required prior to P. S. & E. approval for all projects in the near future. We, therefore, highly recommend that you make every effort to abide by your tentative scheduling for including this project in your July, 1973, letting." (39 (a))

Defendants here were clearly attempting to avoid the spirit of NEPA, if not its letter, an element to consider when deciding whether to apply an equitable doctrine such as laches. Judge Medina, in his concurring opinion in *Monroe*, stated:

> "On the other hand, I am persuaded that some State and Federal highway officials are inclined to look down on conservationists and environmentalists as trouble makers. The only way to change this attitude is to require full and strict compliance with applicable valid statutes and administrative regulations . . ."

Apparently, Judge Medina's admonition, which comes across loud and clear, fell on deaf ears. Even though the defendants were on clear notice of their statutory duties, they still attempt to sidestep those duties through claiming that petitioners have sat on their rights and delayed bringing suits to defendants' prejudice. Should a lawsuit even have to be brought to bring governmental agencies into compliance with Federal Law? Considering the gross violations of statutes involved, plaintiffs respectfully submit that the defendants proceeded at their own peril, knowing full well that they have not complied with the Statutes involved. As was stated by Judge Friendly for a Three Judge Court in *City of New York v. United States*, 337 F. Supp. 150, 160, (E. D. N. Y. 1972),

> On the other hand, such considerations do not justify the Commission's disregard of the law. The tardiness of the parties in raising the issue cannot excuse compliance with NEPA: primary responsibility under the act rests with the agency.

Based upon the foregoing, and in light of this Court's ruling in *Green County v. F. P. C.*, 445 F. 2d 412, (2nd Cir. 1972) to the effect that ". . . [D]elay is a concomitant to the implementation of the procedures prescribed by NEPA, hence the excuse of Delay is not available to defendants . . . [B]alancing of the equities will favor plaintiffs", it is respectfully urged that the District Court did not err by refusing to apply the doctrine of laches.

POINT II

The District Court did not abuse its discretion by entering a preliminary injunction.

The District Court did not abuse its discretion by granting injunctive relief, because without such relief, plaintiffs will be irreparably injured in at least three ways. First, the construction of the Bridge may adversely effect land, air, water, and natural systems which plaintiffs enjoy. Second, contract work on the Bridge will foreclose the consideration of less environmentally destructive alternatives which NEPA requires. Third, defendants failure to follow the statutory procedures for preparing an EIS will deprive plaintiffs of their rights to avoid and mitigate the harmful effects of proposed construction through informed Federal Highway Administration decision making.

A. If injunctive relief is not granted, consideration of less environmentally destructive alternatives will be foreclosed.

Section 102 (2) (c) of NEPA requires each environmental statement prepared pursuant to its provisions to include "alternatives to the proposed action." In addition, Section 102 (2) (D) of NEPA requires each federal agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative use of available resources."

This Court has emphasized the importance of thoroughly evaluating alternatives to proposed action in the process of preparing and considering environmental statements. In *Monroe, Supra* at 697-698, the Court stated "[t]he requirement for a thorough study and detailed description

of alternatives, which was given further congressional emphasis in Section 4332 (2) (D) is the linchpin of the entire impact statement." Also see, *e.g., Scientists for Public Information Inc. v. AEC,* 481 F. 2d 1079 (D. C. Cir. 1973); *Natural Resources Defense Council v. Morton,* 458 F. 2d 827, 833-34 (D. C. Cir. 1972); *Committee for Nuclear Responsibility Inc. v. Seaborg,* 463 F. 2d 783, 786-87 (D. C. Cir. 1971); *Calvert Cliffs' Coordinating Committee v. AEC,* 449 F. 2d 1109, 1114 (D. C. Cir. 1971).

The Council on Environmental Quality's Guidelines Section 6 (IV), 36 Fed. Reg. 7724, 7725 (1971), also makes the same point: "A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is *essential.*" [emphasis added.] Moreover, most of the Federal Courts which have enjoined further construction work on a particular proposed Federal-aid highway pending compliance with NEPA have recognized that continued work would, as a practical matter, foreclose consideration of less environmentally damaging alternatives. *Scherr v. Volpe,* 466 F. 2d 1027, 1034 (7th Cir. 1972); *Arlington Coalition on Transportation v. Volpe,* 458 F. 2d 1323, 1327, 1333-1374 (4th Cir. 1974) *cert. den. sub. nom. Fugate v. Arlington Coalition on Transportation,* 93 S. Ct. 312 (1972); *Lathan v. Volpe,* 455 F. Supp. 1324, 1349 (C. D. Calif. 1972); *Stop H-3 Association v. Volpe,* 349 F. Supp. 14, 17 (D. Ha. 1972); *Northside Tenant Rights Coalition v. Volpe,* 346 F. Supp. 244, 249 (E. D. Wisc. 1972).

The same is true in this case. If the Federal Highway Administration takes action to commit further federal funds for construction which defendants are unlawfully exempting from NEPA's procedural requirements, the state will continue to undertake work in reliance on these

commitments. That work will, by its own momentum, weigh against serious consideration of less environmentally damaging alternatives. These alternatives may include other actual construction schedules and procedures, design plans, locations and other ways of attaining the proposed Bridges' transportation goals. To the extent that any further work on Bridge construction discourages or precludes consideration of less environmentally damaging alternatives, the interests of plaintiffs in the restoration, wide use and perpetuation of the valuable natural resource of Lake Chautauqua will be irreparably damaged. As the Court pointed out in *Lathan v. Volpe*, 455 F. 2d 1111 (9th Cir. 1971), "If the only question is NEPA's applicability, and the basic facts are not disputed, no balancing of equities is required, and an injunction should issue."

B. Defendants' failure to comply with NEPA's procedural requirements deprives plaintiffs of their rights to avoid or mitigate degradation of environmental values through informed Federal Highway Administration decision making.

Plaintiffs are without a doubt a "concerned public organization" of the kind to which Congress referred in Section 101 (A) of NEPA, when it declared that:

> ". . . [I]t is the continuing policy of the Federal Government, in cooperation with . . . concerned public . . . organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

Plaintiffs bring this action in their capacity as such "concerned public organizations," and on behalf of many local residents who would be directly effected by the construction of this Bridge and who have a responsibility under Section 101 (c) of NEPA "to contribute to the preservation and enhancement of the environment."

A primary purpose of NEPA's procedural requirements was to open up federal agencies' decision making processes and subject them to "critical evaluation by those outside the agency, including the public." *Environmental Defense Fund v. Froehlke, Supra* at 351; *Monroe County Conservation Council v. Volpe, Supra* at 698. This purpose is attained by making draft environmental statements available for review and comment as part of each federal agency's decision making processes CEQ Guidelines, Section 7, 36 Fed. Reg. 7725 (1971).

If the procedural requirements of NEPA are not followed, plaintiffs are obviously themselves deprived of the opportunity to review and comment on it. There is no further opportunity for them to carry out their responsibility under NEPA to contribute to the preservation or enhancement of the environment by submitting their views and expert opinion in the Federal Highway Administration's decision making process. Less obviously, but just as surely, plaintiffs are also deprived of the objective evaluation of proposed actions and alternatives which may be expected in comments by interested federal and state agencies such as the Environmental Protection Agency. Defendants' unlawful construction without complying with NEPA's procedural requirements irreparably injures plaintiffs by depriving them of these rights to open, informed decision making by the Federal Highway Administration. See, *Natural Resources Defense Council v. Morton*,

Supra at 172; *Izaah Walter League of Am. v. Schlesinger*, 337 F. Supp. 287, 295 (D. D. C. 1971); *cf. D. C. Federation v. Volpe, Supra.*

This Court has consistently upheld the congressional policy underlying NEPA. The public interest in orderly, informed environmental decision making outweighs any claim of hardship that may be made, real or imagined. We do not at this time seek either an order or a judgment which would permanently enjoin or prevent the construction of the Bridge. Once defendants have complied with the procedural requirements of NEPA, they may proceed to decide whether or not to approve construction. Four and one-half years after NEPA's effective date is not unreasonably soon to begin to comply.

We are before this Court seeking full compliance with a law which Congress required all federal agencies to implement "to the fullest extent possible" in order to preserve and enhance our Nation's environment. We seek compliance with the overwhelming weight of federal case law. We seek only to preserve our right to contribute to final decisions before they are made, in the manner the law requires. We seek environmental statements on this project which will have significant environmental impact and which, without the District Court's Order, would escape compliance with the law.

As this Court has stated in *Green County Planning Board v. F. P. C., Supra* at 420, "We can only add our voice to that of the District of Columbia Circuit in Calvert Cliffs: 'It is for more consistent with the purposes of the Act to delay operation at a stage where real environmental protection may come about than at a stage where corrective action may be so costly as to be impossible.' [Calvert Cliffs at 1128.]"

Clearly, Judge Curtin did not abuse his discretion in ordering an injunction so that the law may be complied with.

Conclusion

The Decision and Order appealed from should be affirmed.

Dated: September 17, 1974.

Respectfully submitted,

SARGENT & LIPPES,

By Richard J. Lippes,
Attorney for Plaintiffs-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Royal Steubing et al
v
Claude S. Brenegar et al
Docket No. 74-1911

I, Roger J. Granioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 20 day of September, 1974 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to: each of the following:

Douglas S. Dales, Jr.
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Mrs. Eva Dahz
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New York, New York 10017

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Lippes, Esq.

800 Western Building, Buffalo, New York 14202

Roger J. Granioplene

Sworn to before me this

20 day of September, 1974

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19..7.1